SUPREME COURT, U. S.

FEB 12 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 957

LAWRENCE BURNS,

Plaintiff-Appellee,

—against—

THE CUNARD STEAMSHIP COMPANY, LTD.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—against—

JOHN T. CLARK & SON,

Third-Party Defendant-Appellee.

BRIEF OF RESPONDENT, JOHN T. CLARK & SON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondent, John T. Clark & Son, has no argument with the recital of the testimony which has been set forth in petition and brief. However, on that very testimony and under a proper charge by the Trial Court the petitioner has been held liable to the plaintiff, respondent herein, and in turn has been disqualified from obtaining indemnity from John T. Clark & Son by a decision of the Trial Court, the trier of the facts, the full text of which decision appears at Pages 33 to 37 of the petition and brief.

On that very testimony and on appropriate principles of New York law the United States Court of Appeals for the Second Circuit on December 4, 1968 affirmed the judgment which the plaintiff had obtained against the petitioner and in turn affirmed the dismissal of the petitioner's third-party complaint against John T. Clark & Son.

The opinion of the United States Court of Appeals for the Second Circuit is found at Pages 38 to 40 of petitioner's petition and brief.

In an effort to show this Court that the law of New York was not applied properly by the Trial Court and by the United States Court of Appeals for the Second Circuit a disingenuous approach has been employed by the petitioner to place a gloss upon which the two Courts below have done.

We are dealing strictly with the substantive law of the State of New York and the framework within that parochial law in which the facts in this matter are placed.

It will be the province of this brief in opposition to demonstrate insofar as this respondent is concerned that no valid reason has been shown by petitioner for this Court's review by certiorari of what has been properly determined by the United States Court of Appeals for the Second Circuit.

POINT I

No valid reason has been shown by the petitioner for this Court granting the petition for a writ of certiorari.

In limine, all parties agree that under *Erie* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, the substantive law of the State of New York must be applied to the facts which are embraced by this case. The petitioner would have this Court believe that the Court below applied Federal interpretations of the New York law. Whether this is a question of semantics is not involved. Any Court must interpret the law which it must apply and the Court below, presented with a simple issue, properly applied the substantive law of the State of New York.

Even *if* it did not it has been repeatedly held by this Court that the determination of local law by a Federal Court of Appeals is normally accepted and is not to be disturbed. *The M/V Tungus* v. *Skovgaard,* 358 U.S. 594, 79 S.Ct. 503; *Commissioner* v. *Estate of Bosch,* 387 U.S. 456, 87 S.Ct. 1776; *Ragan* v. *Merchant Travel Co.,* 337 U.S. 530, 69 S.Ct. 1233.

POINT II

Both courts below properly applied the New York law and concluded that no right of indemnity exists.

The Trial Court, as the trier of the facts and law applicable to the third-party complaint, determined that under New York law the petitioner was an "active" tortfeasor which disenfranchised the petitioner of a right of indemnity. In this respect it was singularly correct. *McFall* v. *Compagnie Maritime Belge,* 304 N.Y. 314; *Bush Terminal Buildings* v. *Luckenbach S.S. Co.,* 9 N.Y. 2d 426; *Jackson* v. *Associated Dry Goods Corp.,* 13 N.Y. 2d 112.

In reviewing what the trier of the facts had determined, *viz.*, Tyler, *D.J.*, the United States Court of Appeals in affirming the dismissal of the third-party complaint appropriately said:

> "Judge Tyler properly dismissed Cunard's third-party complaint against Clark. Under N. Y. Labor Law § 200, Cunard had a duty to inspect the area and to repair the hole, since a reasonable inspection would have disclosed its existence. Cunard's failure to do so was active negligence and thus it cannot obtain indemntiy from Clark. See Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co., 9 N.Y. 2d 426 (1961); Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145 (1943); Eisenbach v. Gimbel Bros., 281 N.Y. 474 (1939)."

The petitioner would have this Court re-evaluate findings of fact by the trier of the fact and would have this Court determine that the United States Court of Appeals for the Second Circuit incorrectly accepted the finding of the District Court and its application of the law without there being any dispute by the parties in this matter as to what the law is.

It is respectfully submitted that the District Court and the United States Court of Appeals have properly appraised the facts and have properly applied the substantive law of the State of New York and that when the arguments of the petitioner are placed in a crucible of analysis the precipitate is nothingness.

CONCLUSION

Nowhere has the petitioner shown this Court any valid reason for the granting of a writ of certiorari so that this Court would be then required to review a simple question of the substantive law of the State of New York. The petition is singularly devoid of any showing that the Courts below, which were *Erie* bound, did not properly apply the substantive law of the State of New York. The petition should be denied in all respects to which ends this brief is

Respectfully submitted,

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John T. Clark & Son